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No. 95-740

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY, *Petitioner*

v.

EVELYN CROCKER,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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REPLY BRIEF FOR THE PETITIONER

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14 pp

TABLE OF CONTENTS

	Page
REPLY STATEMENT OF FACTS	2
ARGUMENT	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases **Pages**

Benson v. *Frederick*, 97 Eng. Rep. 1130 (K.B. 1766) 6

BMW of North America, Inc. v. *Gore*, No. 94-896 . . . . . 1, 5, 10

Crookston v. *Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991) 6

Gilreath v. *Allen*, 32 N.C. 67 (1849) 6

Honda Motor Co. v. *Oberg*, 114 S. Ct. 2331 (1994) 1

Life Ins. Co. of Georgia v. *Johnson*, 1995 WL 683857 (Ala. Nov. 17, 1995) 1

Livesy v. *Stock*, 281 P. 70 (Cal. 1929) 6

Memphis Community School Dist. v. *Stachura*, 477 U.S. 299 (1986) 5-6

TXO Prod. Corp. v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) 1, 3, 6

Regulations

Ala. Ins. Reg. No. 28, § II(C)(1) 3

Ala. Ins. Reg. No. 28, § VI(B) 3-4

REPLY BRIEF FOR THE PETITIONER

Respondent launches a barrage of non sequiturs in trying to persuade the Court that this case does not merit being held for *BMW*. For example, she emphasizes repeatedly (Opp. 1-2, 20-21) that the petition is limited to the important and recurring issue of excessive punitive damages, even though other issues were also at one time considered for presentation.[1] She also cites the irrelevant fact that the Alabama Supreme Court has adopted new procedures for administering punitive damages. Opp. 3-4.[2] She falsely accuses us of "fail[ing] to present the facts in the light most favorable to the judgment below." Opp. 4.[3] And she repeatedly attempts to tar Union Security with First Alabama, Choctaw's brush. See, *e.g.*,

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[1] As the Chamber of Commerce points out in its amicus brief (at 6), the fact that Union Security's petition is limited to the excessiveness issue makes this case an attractive candidate for certiorari in the event that the Court does not reach the excessiveness issue in *BMW*.

[2] As this Court has recognized, the Due Process Clause imposes a substantive limit on punitive damages that is distinct from the right to fair procedures. See, *e.g.*, *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2335 (1994); *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993). The petition presents a substantive excessiveness issue of nationwide importance — an importance not in the least diminished by revisions in Alabama's procedures.

In any event, the vaunted new procedures are not likely to ameliorate the problem of excessive punishments in Alabama, for they include allowing plaintiffs to introduce evidence of the defendant's financial condition and then instructing juries that "the amount of punitive damages should 'sting' the defendant, considering his financial condition." *Life Ins. Co. of Georgia* v. *Johnson*, 1995 WL 683857, at *10 (Ala. Nov. 17, 1995) (internal quotation marks and citation omitted). These changes alone amount to a prescription for ever larger punitive exactions, regardless of the effects of other procedural revisions.

[3] Our presentation of facts, which we sought to make meticulously accurate, is, unlike respondent's, borne out fully by citations to the record. Where facts were in dispute, we so informed the Court. See Pet. 5-6 nn. 6-7. Our position does not in any way depend on acceptance of the defense version of any disputed facts.

Opp. 4-5, 10, 15 (referring to *First Alabama, Choctaw's* failure to issue certificates of insurance); Opp. 8, 11 n.8 (referring to *First Alabama, Choctaw's* delay in making refund to Mrs. Crocker); Opp. 10 (referring to *First Alabama, Choctaw's* threats to foreclose).

What respondent cannot do, however, is point to anything in the record to refute the central reality in this case: Union Security was punished $2 million for an isolated act of misconduct by its "agent," a First Alabama, Choctaw branch manager whose fraud was calculated to benefit the bank and was directed principally against Union Security itself. Because Union Security was the target, not the perpetrator, of the fraud, this case is an especially clear instance of punitive damages run amok, and an unusually attractive one for addressing the substantive limits on punitive damages.

REPLY STATEMENT OF FACTS

Respondent's factual recitation is replete with inaccuracies. Many of these are irrelevant since, for purposes of this petition, we accept the jury's improbable conclusion that it was Taylor and not the Crockers who engaged in the fraud.[4] But

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[4] Nevertheless, we must correct some of the more egregious misstatements relating to Taylor. For example, respondent suggests (Opp. 6 n.5) that she agreed to purchase credit life insurance only after Taylor told her that she had to. In fact, she testified squarely that she wanted credit life insurance and that she had it on her other loans. R. 572-573. Even more misleading is the claim (Opp. 7 n.6) that Taylor admitted that he did not ask the Crockers the health questions. The quoted statement of Taylor was made in response to the suggestion that he could have misremembered whether the Crockers had answered "yes" to any of the health questions. See R. 508-509. Taylor testified repeatedly that he asked them those questions. R. 504-506, 522. Finally, respondent falsely states (Opp. 5) that "Taylor testified that he received from Union Security 'a monetary payment or incentive connected with the sale of credit life insurance.'" In fact, Taylor never said that he received a payment from Union Security. While he acknowledged that he received a monetary incentive in connection with the sale of credit life insurance through Union Security (R. 540), this monetary incentive was provided by First Alabama. C.

some of the misstatements do reflect on Union Security's own conduct. We correct them here so as to dispel any lingering doubts as to whether the record possibly could support a conclusion that Union Security was engaged in some kind of egregious misconduct. As the Chamber of Commerce points out in its amicus brief (at 9), "this case involves no 'bad facts'" equivalent to the ones that caused the Court to uphold the judgment in *TXO*.

1. Respondent states (Opp. 4) that Union Security "had adopted a deliberate 'see-no-evil' policy that facilitated the commission of fraudulent acts by its agents." As her failure to cite anything for this assertion suggests, there is not a whit of evidence that Union Security had a "deliberate 'see-no-evil' policy." Nor was there evidence that Taylor or any other agent *ever* had engaged in a fraudulent act other than the one charged here. Indeed, as the trial court expressly found, the alleged fraud on Taylor's part was "an isolated incident." Pet. App. 23a. See also *id.* at 20a.

2. Respondent repeatedly asserts (Opp. 4-5, 10, 15) that Union Security failed to provide its insureds with written copies of their policies. The record is unequivocal, however, that Union Security provided certificates of insurance to First Alabama Bank and that it was the president of First Alabama, Choctaw who made the unilateral decision not to send the certificates to covered debtors. R. 326-327, 448, 746-748.[5]

328-330. The "incentive" was hardly the kind that would induce someone to perpetrate a fraud: loan officers with sales of between $20,000 and $30,000 would receive a mere $600 (C. 330) — as little as $1 for every $50 dollars of premium. Thus, for the Crockers' $1,600 premium, Taylor could expect to receive a whopping $32.

[5] It is technically true, as the Alabama Supreme Court noted (Pet. App. 3a), that Union Security does not issue a written "policy" to covered debtors. Because the policy at issue is *group* credit life, the policy itself is issued to First Alabama. See Ala. Ins. Reg. No. 28, §II(C)(1). The certificate of insurance is all that need be sent to a covered debtor. *Id.* §

3. Respondent misleadingly states (Opp. 8) that "Union Security took no steps to ensure that a refund of the insurance premium was made." It is undisputed that Union Security instructed First Alabama, Choctaw to refund the premium. R. 346-347, 739. *First Alabama, Choctaw* may have been negligent in failing to carry out its responsibility, but that was hardly the fault of Union Security.[6]

ARGUMENT

Nothing respondent has said undermines the petition's showing that the punitive damages in this case are grossly disproportionate to the gravity of whatever tort Union Security could be said to have committed and bear no reasonable relationship to any measure of harm to Mrs. Crocker or gain to Union Security.

1. *The ratio of punitive damages to actual and potential harm.* We demonstrated in the petition (at 17-18) that the $2 million punishment in this case bears no defensible relationship to whatever harm could be said to have befallen Mrs. Crocker as a consequence of Taylor's alleged fraud. The response is two-fold. First, respondent claims (Opp. 8-12, 14-15) that it is improper to treat the $5 million general verdict (which now stands at $2 million after remittitur and the bank's pro tanto settlement) as entirely punitive because she sought damages for mental anguish. Second, she argues (Opp. 13-14) that, because she could have lost her home, her potential harm exceeds her actual harm. Neither of these arguments suffices

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VI(B). As indicated in text, the fault for the failure to send the Crockers a certificate of insurance is entirely First Alabama, Choctaw's.

[6] Respondent elsewhere (Opp. 10-11 n.8) accuses us of trying to "shift the blame" for the failure to pay the refund and states that it was "only" because of "the personal intervention" of the President of First Alabama, Choctaw that the refund was ever paid. Of course, since it was the *bank's* obligation to pay the refund under the contractual relationship between Union Security and the bank, Union Security is not shifting the blame, merely identifying where it belongs.

to remove this case from the class of ones that could be affected by the outcome in *BMW*.

With respect to mental anguish, it is true that Union Security did not object to the use of a general verdict,[7] but it is equally true that Mrs. Crocker failed to adduce *any* admissible evidence of mental anguish. Although she blames Union Security for successfully invoking Alabama evidentiary principles to prevent her from testifying about her state of mind (Opp. 11 n.9), it plainly was her burden to support with evidence the damages she was seeking. If she had suffered from loss of sleep or eating problems as a consequence of this experience, she could have so testified; such testimony does not involve simply "mental operations." Similarly, if her distress had required her to consult a doctor or therapist, or to take prescription medication, nothing would have prevented her from telling the jury. The truth of the matter is that the mental anguish claim was an insignificant aspect of her case until the time came to defend the punitive damages award.[8]

Because Mrs. Crocker neither attempted to quantify her anguish for the jury nor adduced any evidence that she suffered such anguish, there is no reason to assume that "a substantial portion" (Opp. 9) of the $2 million verdict represents compensation for mental anguish. But even accepting the suggestion that there were "substantial" mental anguish damages, that would hardly insulate the $2 million verdict from a claim of excessiveness. The size of that judgment vastly exceeds whatever tiny profit Union Security could be said to have made and has the same deterrent effect no matter how it is labeled. See, *e.g.*, *Memphis Community School Dist.* v. *Stachura*, 477

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[7] Respondent's representation (Opp. 3) that Union Security "declined" to request an itemized verdict has no support in the record.

[8] Mental anguish received only a passing reference during respondent's summations. See R. 832. By contrast, respondent's counsel went to great lengths to try to persuade the jury to return a multi-million verdict for purposes of punishment and deterrence. R. 833-834, 893-902.

U.S. 299, 307 (1986) ("Deterrence * * * operates through the mechanism of damages that are *compensatory*.") (emphasis in original). In such circumstances, a punishment of 20 times the "soft" damages suffered by Mrs. Crocker (assuming for purposes of argument a very liberal mental anguish award of $100,000) would still be utterly disproportionate and far exceed any amount reasonably necessary to accomplish rational deterrence. See, *e.g.*, *Crookston* v. *Fire Ins. Exch.*, 817 P.2d 789, 811-812 & n.29 (Utah 1991) (when compensatory damages are comprised largely of "soft" damages, the permissible ratio of punitive damages to compensatory damages should be smaller than if compensatory damages are essentially all "hard" damages).

Nor can respondent's "potential harm" argument save her $2 million verdict. As with mental anguish, Mrs. Crocker made no effort to demonstrate the extent of her potential harm. Yet since it is she who seeks to inject potential harm into the inquiry, it is she who bears the burden of establishing what that harm amounts to. Compare *TXO*, 113 S. Ct. at 2722 (record contained evidence from which it was possible to conclude that the potential harm to respondent was between $5 million and $8.3 million).

More fundamentally, there is a serious doctrinal question whether potential harm should have a role in cases like this one. Potential harm has been invoked principally in cases involving *deliberate* misconduct that fell short of its *intended* consequences. *TXO*, for example, involved a failed attempt to bully a small property owner into giving up potentially valuable mineral rights. In that case, it made good sense for the Court to take into account the losses that the respondent might have sustained had petitioner's oppressive scheme succeeded. See also *Livesy* v. *Stock*, 281 P. 70 (Cal. 1929); *Gilreath* v. *Allen*, 32 N.C. 67, 70 (1849); *Benson* v. *Frederick*, 97 Eng. Rep. 1130 (K.B. 1766). This case, in contrast, involves no deliberate misconduct on the part of Union Security. In cases of vicarious liability, it makes little sense to justify massive

verdicts by reference to speculative potential harm that the defendant had no intention of inflicting.

2. *Reprehensibility*. Respondent throws a variety of theories of wrongfulness at the wall, hoping that some will stick. But none do.

The principal basis for punishing Union Security is vicariously — for the fraud of the bank officer, who was registered as Union Security's agent in connection with the sales of credit life policies. In an effort to identify some wrong on Union Security's own part, respondent asserts that "no one from Union Security adequately supervised Taylor, 'nor had anyone from the insurance company ever explained to him the provisions of [the credit life] policy or the procedures relative to same.'" Opp. 15 (quoting Pet. App. 18a). Moreover she argues (Opp. 16) that "Union Security employs no safeguards whatsoever to ensure that its agents accurately fill out the health questions on its medical statement."

These assertions fail to advance her cause. To begin with, Taylor was an agent of Union Security's only in the most technical sense. He was first and foremost an officer of the bank, which, moreover, was the principal beneficiary of the insurance, which guaranteed that its loan would be repaid. To the extent Taylor committed a fraud, that fraud is far more the responsibility of his true principal, First Alabama, Choctaw than his victim, Union Security, which would have been on the hook for roughly $14,000 if Mr. Crocker had survived the one-year contestability period before dying. The practice of punishing the victims of wrongdoing is somewhat unusual in this country, at least outside of Alabama.

Moreover, the charge of inadequate supervision and lack of safeguards falls flat in light of the trial court's repeated finding that this alleged tort was an isolated incident. Pet. App. 20a, 23a. Respondent's inability to unearth, from among the tens of thousands of credit life transactions each year, a single other incident of fraud on the part of either Taylor or any other agent thoroughly undermines the suggestion that

there was inadequate supervision on the part of Union Security. As for the accusation that no one from Union Security explained to Taylor that he should not falsify health statements, it would probably not occur to many insurers (or anyone else for that matter) that something so fundamental needs to be the subject of training or that massive punishment is needed to deter insurers from falling victim to such misconduct.

Respondent also invokes the failure to provide the Crockers with a certificate of insurance (as if that would have made any difference to a person who admitted to putting away her loan documents without ever looking at them (see R. 632-633)). As explained above (at pages 3-4), the fault for this failure was entirely First Alabama, Choctaw's. Accordingly, while the failure to issue a certificate of insurance may have been an "important bas[i]s of the damages award" with regard to *First Alabama, Choctaw*, it supplies no support for the $2 million exaction against Union Security.

Respondent half-heartedly defends the Alabama Supreme Court's holding that there is something wrongful about deferring investigation until after a suspicious claim is filed. Opp. 16-17. Perhaps Union Security was guilty of naivete in failing to recognize that it was not entitled to assume that most applications it receives would be filled out truthfully, but this is hardly the stuff of multimillion dollar punishments. Nor does it "create[] an atmosphere in which agents have every incentive to defraud customers into signing up for credit life policies for which they would be disqualified for health reasons if they asserted a claim" (Opp. 16), since the policy can "mislead" only those who either make false statements on their applications or blindly sign applications containing false statements written in by their agent — hardly a group deserving of the enormous solicitude shown by the courts below. Finally, as we pointed out in the petition (at 14 n.11), the Alabama Supreme Court's rationale (and respondent's defense of it) cannot be squared with the fact that all credit life coverage sold in Alabama becomes incontestable one year (or less) after coverage commences: when there is a short contest-

ability period, the most likely victim of any fraud by an agent is the insurer, not the covered debtor.

3. *The gain to Union Security.* Respondent has no answer to our showing (Pet. 18-20) that the $2 million exaction in this case bears no relationship to whatever gain Union Security could be said to have received as a result of Taylor's one-time fraud. She merely repeats talismanically the entirely irrelevant fact that Union Security earned $1.29 million in 1991 from the sale of credit life insurance throughout the country. Her argument does nothing more than expose her belief that Union Security should be punished severely for being in the business of selling insurance.[9]

4. *Financial position.* Respondent makes the remarkable argument (Opp. 18) that Union Security's financial condition "precludes any substantive due process attack on the award." This is another way of saying that large companies (or even comparatively small ones like Union Security) have no right to protection from excessive punishments as long as they have the wherewithal to pay them. This kind of argument — which has

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[9] Respondent attempts to divert attention from this weakness in her argument by claiming (Opp. 17) that "Union Security earns immense profits" from the sale of credit life insurance. Of course, the loss ratios she cites are not a proxy for profits: they do not take into account the cost of selling and administering the insurance. More significantly, respondent has never shown a causal link between Union Security's loss ratios and its practice of deferring investigation until after a suspicious claim is made. Nor could she. The record is unequivocal that Union Security pays over 99% of the non-suicide claims made against it. See Pet. 4. If Union Security were to investigate the accuracy of every Health Statement before issuing coverage, that would increase its costs, which in turn would be passed on to its insureds. Ironically, this would make Union Security's loss ratios even lower because those ratios only measure the percent of premiums made out in claims and take no account of the cost of generating those premiums. Finally, we cannot help noting that respondent's focus on Union Security's "immense profits" boils down to the contention that there is something wrongful about being successful — a poor justification for the massive punishment in this case.

not a whit of support in this Court's precedents — serves only to highlight the pernicious effect of corporate wealth in punitive damages cases.

5. *The costs of litigation.* Respondent attempts to justify a $2 million exaction by reference to her costs of litigating this case. Of course, the $2 million exaction is grossly disproportionate to those costs. More importantly, this argument is circular: it was only the prospect of a multimillion dollar windfall that caused Mrs. Crocker and her counsel to invest large amounts in prosecuting what would otherwise have been a modest claim that could have been pursued more economically. Manifestly, the creation of additional incentives for expensive litigation, while nice for lawyers, is not a good reason to sustain large punitive damages.

CONCLUSION

This case is, if anything, a better vehicle for deciding the excessiveness issue than *BMW* itself. As in *BMW*, there is no reprehensible conduct here; indeed, as in *BMW* (and contrary to respondent's assertion (Opp. 22)), Union Security's conduct was expressly permitted by Alabama law (see Pet. 15-16 & n.13). Moreover, just as in *BMW*, the verdict here is entirely disproportionate to any tenable measure of harm to the respondent or gain to Union Security. Although, as respondent helpfully points out (Opp. 22) there is no issue of multiple punishment, that fact simply adds to the excessiveness of the punishment, since respondent cannot measure the magnitude of Union Security's "wrongdoing" by its impact on large numbers of victims. The Court accordingly should hold the petition until it has decided *BMW*. If it does not reach the excessiveness issue in that case, it should grant Union Security's petition and decide the issue in this case.

Respectfully submitted.

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